

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue date: 25Oct2002

In the matter of
James Henderson
Claimant

v.

Case No. 2002 LHC 00878

Florida Stevedoring Co.
Employer

and

**Signal Mutual Indemnity
Association, Ltd.**
Carrier

DECISION AND ORDER
APPROVING STIPULATION

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901, et seq., (the "Act"), and the regulations promulgated thereunder. The Claimant is represented by Howard L. Silverstein, Esquire, of Miami, Florida and the Employer/Carrier is represented by James W. McCready, III, Esquire, Miami, Florida. On October 10, 2002, Mr. McCready submitted the following:

1. Application for Approval of Agreed Settlement;
2. Proposed Order;
3. Petition for Attorney's Fees; and
4. An itemization of Hours and Costs prepared by the Claimant's counsel.

The parties have stipulated to the following:

I. Disputed Issues

The issues presently in dispute are the Claimant's average weekly wage and compensation rate, whether the Claimant has had a scheduled injury, entitlement to payment of additional medical bills, whether the Claimant has suffered a loss of wage-earning capacity related to his alleged work-related injury, causation as to Claimant's alleged shoulder injury and entitlement to penalties, interest, costs and attorneys fees.

1. Average Weekly Wage: The Employer and its Carrier contend that the Claimant has suffered only a scheduled injury involving an amputation to the last digit of the middle finger of his right hand, and injury to elbow.

2. Loss of wage earning capacity: The Employer/Carrier deny that the Claimant is entitled to a loss of wage earning capacity.

3. Medical Bills: The Employer/Carrier deny that the Claimant has outstanding medical

bills with William Tejeiro, M.D., and that all medical bills due and owing under the Longshore and Harbor Workers' Compensation Act have been paid.

4. Average Weekly Wage: The Employer/Carrier contend that the average weekly wage calculated at \$772.92 is inaccurate and should be corrected to reflect an average weekly wage of \$593.27 with a compensation rate of \$395.51. Employer/Carrier are entitled to a credit of any overpayment of temporary total disability benefits if and when payments for the scheduled injury occurs. Claimant maintains that the Employer/Carrier is entitled to no such adjustment.

5. Penalties, Interest, Costs and Attorneys' Fees: The Employer/Carrier contend that no penalties, interest, costs and/or attorneys' fees are owed as a result of this July 13, 2001 occurrence.

II. Agreed Statement of Fact

1. Date and Description of Incident: On July 13, 2001, Mr. Henderson was employed by Florida Stevedoring as a forklift operator when he allegedly injured his right middle finger, right arm, right elbow and right shoulder. Specifically, he was working on the dock loading steel rebars. While moving a board on a flat bed, the steel moved and smashed his finger and bruised his right elbow. He received medical treatment at Mount Sinai Emergency Room, Dr. Wittels and Miami Heart Institute.

2. Nature of Injury (including degree of impairment and/or disability): Mr. Henderson

was first treated at Mt. Sinai Medical Center in the emergency room on July 13, 2001 for the laceration to his right elbow and the third finger of his right hand. He was treated, put in a splint and referred to Dr. Wittels, an orthopedic surgeon for evaluation. The first visit with Dr. Wittels was on July 13, 2001. He was on light duty with no use of hand work status. The Claimant had another office visit on July 16, 2001. At that time, Mr. Henderson complained of a cut to the tip of his finger and a crush injury to his arm. He had complaints of pain and problems on the fingertip. He was to be treated conservatively with dressing changes. He had no other significant complaints or problems. He was on a no work status. By July 25, 2001, Dr. Wittels recommended physical therapy. It was noted that his crush injury of the upper extremity felt a little better. He also diagnosed the Claimant on this same date as having a partial R-hand finger amputation and R-elbow radial head fracture. On August 13, 2001, he was referred for a surgical revision of the fingertip of the right middle finger.

Surgery was performed to the Claimants finger as per these instructions. After the surgery, Mr. Henderson followed up with Dr. Wittels. On August 24, 2001, he was complaining of problems with his shoulder and elbow, but the doctor was holding off on any treatment. His motion and strength was getting better, but he felt a popping which was causing him some pain. He was continued on a no work status. He had another visit on September 12, 2001 and by September 20, 2001 his finger was doing better. In October, he continued to complain of shoulder and elbow pain. The doctor had not

responded to inquiries as to how the shoulder pain was related, therefore an independent medical examination was conducted on November 8, 2001.

On November 8, 2001, Dr. Jay Stein conducted an independent medical examination and determined that the Claimant had a motor vehicle accident ten (10) to fifteen (15) years previously which Dr. Stein opined was the cause of the shoulder pain. According to the American Medical Association Guide to Permanent Impairment Fourth Edition, there was a 30% loss due to the partial amputation of the distal phalanx. On March 27, 2002, the patient was seen by Dr. Wittels for a final examination. His fingertip had some hypersensitivity. He had pain in his elbow and shoulder. He had a Rotator Cuff Tendinopathy to the shoulder and a strain to the elbow. He had reached Maximum Medical Improvement with the shoulder and hand syndrome and was given a rating of 9%.

3. Description of Medical Care: Mr. Henderson was seen on July 13, 2001 in the Mt.

Sinai Medical Center Emergency Room. He was treated for his laceration to the right elbow and third finger of the right hand. He was treated for two (2) lacerations on his right elbow and the injury to his right finger. He was given pain medication and referred to Dr. Wittels.

On August 14, 2001, he was admitted to the hospital for a surgical revision to his right middle finger. During his hospitalization, he was noted to have high blood pressure and was treated by Dr. David M. Cohen.

Dr. Wittels first saw the patient on July 13, 2001 and issued a notice of claim disability status indicating light duty and no use of the hand. The first office visit, dated July 16, 2001, notes that he had cut off his fingertip and "crushed his arm." He was placed on a no work status. The office visit of July 20, 2001 reflects that he was on Augmentin as well as Percocet. The dressing for his finger was removed and replaced. The remaining sutures in the lateral aspect of the elbow were removed. He was seen on July 25, 2001 and among other things it was noted that the crushed injury of his upper extremity felt a little better. After continued conservative treatment, he was referred on August 13, 2001 for surgery which was noted above.

Mr. Henderson had approximately 27 occupational therapy treatments between August 1, 2001 and November 12, 2001. The first visit on August 1, 2001 indicates a diagnosis of elbow sprain and crush injury to the right finger. He received massage therapy to the right elbow. The objective notes on the last visit of November 12, 2001 reflect therapy to the elbow and fingers. Generally, the records show an increase in strength and range in motion specially in the elbow. The elbow swelling had decreased.

The Claimant continued treating with Dr. Wittels while undergoing his physical therapy. On August 17, 2001, he was seen for a follow-up office visit. His complaints focused

more on his shoulder and elbow including possibly a popping sound which was giving him some pain, although it is unclear what was popping. On August 29, 2001, it was noted that he had limited range of motion of the elbow. He was still on a no work status. On September 12, 2001, he was continuing to have pain and problems in his shoulder and elbow. He continued to have the same kind of problems on September 28, 2001. On October 17, 2001, the doctor described Mr. Henderson as having an upper extremity syndrome to his right upper extremity after the amputation of the distal finger. The shoulder was stiff and painful and he was unable to go through a full range of motion secondary to the pain. The last visit appears to have occurred on March 27, 2002 when the doctor placed him at Maximum Medical Improvement with the shoulder and hand syndrome at a rating of 9%.

Mr. Henderson was referred to Dr. Stein for an independent medical examination. Dr.

Stein obtained a history that Mr. Henderson was in a motor vehicle accident ten (10) to fifteen (15) years previously where he sustained injuries to his right shoulder and neck region. He received physical therapy, but did not make a complete recovery. He described aching after rain or on heavy activity, decreased strength with activity such as weight lifting, and soreness about the right subacromial region period. The vehicle in which he was traveling was totaled and he missed two (2) months of work from the accident. These symptoms have continued. He described aching about his right shoulder. A complete physical examination was conducted. Dr. Stein believed that there was resistance in moving of the fingers. X-rays were essentially normal. There was a 50% loss of the distal phalanx of the right long finger. His impression was a healed laceration to the right elbow and a partial amputation of the distal phalanx of the right long finger. It was his opinion that the complaints to the right shoulder are causally unrelated to the incident of July 13, 2001.

Instead, Dr. Stein attributed the Claimant's shoulder complaints to the motor vehicle

accident to ten (10) to fifteen (15) years previously. It was his opinion that Mr. Henderson was at maximum medical improvement from the July 13, 2001 accident. The sensory complaints of contact causing symptoms to his feet and legs followed no anatomic distribution. According to the American Medical Association Guide to Permanent Impairment, Fourth Edition, there is a 30% loss due to the partial amputation of the distal phalanx. He suggested a rubberized finger cap may be worn as a protective covering unless gloves as desired. He was returned to work at full duty in his usual occupation.

4. Compensation Paid: Claimant's average weekly wage of \$772.92 equates into a compensation rate of \$515.28.

Dates and Form. The Claimant was paid temporary total disability payments from

July 14, 2001 through to November 8, 2001 at \$515.28 per week. The Employer/Carrier contends that the Claimant has received full compensation for his benefits from the July 13, 2001 occurrence. In fact, he has been overpaid due to an inflated average weekly wage. Also, all medical bills from authorized treating physicians causally related to Mr.

Henderson's July 13, 2001 claim have been paid.

5. Terms of Settlement: Claimant and the Employer/Carrier have expressly agreed that all past benefits due and owing to Claimant for the injuries alleged in the incident of July 13, 2001 have been paid. In addition, Claimant has agreed to waive his right to any future Longshore and Harbor Workers' Compensation benefits payable as a result of the alleged injuries and incidents referred to herein and made a part of this Settlement Agreement in return for the Employer, Florida Stevedoring Company, and its Carrier, Signal Mutual Indemnity Association, Ltd., agreeing to pay Claimant a lump sum of \$15,000.00. This Settlement Agreement, therefore, represents any and all potential or actual temporary total or temporary partial disability compensation, wage loss benefits, medical benefits, transportation reimbursement, permanent partial or permanent total disability compensation, rehabilitation benefits, and attendant care benefits arising from the July 13, 2001 incident under the Longshore and Harbor Workers' Compensation Act, to which Claimant might presently be entitled, or to which he may in the future become entitled to receive from the Employers and their Carrier under the provisions of the Act.

The Claimant understands that both he and the Employer/Carrier are under no obligation to settle and close out this Longshore and Harbor Workers' Compensation Act claim; however, the Claimant believes that this lump sum settlement, including the closure of medical care, is in his best interest.

The parties agree that this Settlement Agreement shall be considered null and void if the

Claimant dies prior to the Settlement Agreement being approved and filed by the Administrative Law Judge. Either party may withdraw from this Settlement Agreement at any time prior to its approval and filing by the District Director for any reason including, but not limited to fraud, duress, undue influence, unilateral mistake, or a change in condition. Withdrawal will be effective upon service of written notice of either party's intent to withdraw on counsel for the other party making this Settlement Agreement null and void as of that date. The parties further agree that this Settlement Agreement shall not become binding or enforceable until it has been approved and filed by the District Director.

a. Future loss of wage earning benefits	\$10,000.00
b. Future medical	5,000.00
c. Representative's fee and costs	4,500.00
Total	\$19,500.00

6. If settlement of medical benefits:

- a. Itemization of medical expenses for the past three (3) years: SEE ATTACHED.

- b. Estimate of future medical expenses (include inflation and discount factors): In the unlikely event that additional treatment for the injuries allegedly suffered as a result of the July 13, 2001 incident, \$5,000.00 has been allocated for such cost and treatment.
- c. Information regarding collateral sources for medical expenses: The Claimant has maintained his union membership and benefits, and has returned to full duty at the Port.

7. Reason for Settlement (included disputed issues): As previously indicated, this matter has been strongly contested by the Employer/Carrier. The Employer/Carrier contends that the Claimant's current alleged amputation was a scheduled injury and that the Claimant's shoulder injury was not causally related to the alleged incident of July 13, 2001. Further, Employer/Carrier contends that the Claimant is not entitled to future wage loss benefits and has been overpaid benefits to date as a result of an inflated average weekly wage. The Employer/Carrier further contends that Claimant has returned to full time work at the Port and that Claimant was paid all temporary total, temporary partial, and/or permanent partial disability benefits due.

In light of the dispute between the parties with respect to the above-referenced issues,

all parties feel that it is in the best interest of Claimant and the Employer/Carrier to resolve all claims within the jurisdiction of the Longshore and Harbor Workers' Compensation Act for the lump sum settlement of \$15,000.00, inclusive of medical and compensation benefits and rehabilitation benefits for all pending Longshore and Harbor Workers' Compensation claims of the Claimant against his Employer, in accordance with the terms and conditions set forth above.

8. Claimant's Date of Birth: March 8, 1957.

9. Claimant's Address: Claimant attests that 885 N.E. 206th Street, Miami, Florida, as listed in the Proof of Service contained herein, is his true and correct address.

10. Claimant's Ability to Work (including educational background, present work status, work history, if applicable): As indicated above, all parties represent and agree that the Claimant is unable to return to work as a longshoreman in any capacity either now

or in

the future even with reasonable circumstances.

11. Adequacy of Settlement: The settlement is fair and reasonable in light of the contested issues concerning scheduled loss, average weekly wage, causation, temporary total

disability benefits, temporary partial disability benefits, permanent partial disability benefits,

permanent total disability benefits, loss of wage earning capacity, aggravation of a pre-existing

condition, and penalties, interest, costs, and attorney's fees.

In light of these disputed issues and the medical and vocational evidence, this

Settlement

Agreement is adequate in that it provides Claimant with additional sums with respect to his

claim for permanent partial and permanent total disability benefits. This Settlement Agreement

also provides Claimant with sufficient sums in the unlikely event that further medical treatment is necessary in the future.

Were this matter to proceed to a Formal Hearing, Employer/Carrier contend that Claimant would not have been entitled to any additional temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, permanent total disability benefits, loss of wage earning capacity, or medical benefits. In fact, it may be entitled

to recoup overpayment of benefits. Employer/Carrier further contends that the medical and

vocational evidence adduced to date reveals that Claimant is able to return to work in suitable

alternate employment within his geographical region and work restrictions.

In support of the fee request, counsel for Claimant advises that he has been practicing law since June, 1958, with a specialty in Personal Injury, Maritime Law, Workers' Compensation and cases arising under the Longshore and Harbor Workers' Compensation claims. An itemized statement of the extent and character of the necessary legal services performed was submitted. Claimant's counsel has expended a total of 47.25 hours on this case.

I have reviewed the claim file, the documents presented and the stipulations submitted. I note that the attorneys fee is reasonable and necessary for the services performed. As this is a stipulation before the Office of Administrative Law Judges, approval by the District director is unnecessary. Upon careful review of the documents provided, I accept the stipulation and make the following findings and conclusions:

FINDINGS OF FACT And CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are made:

1. The agreed settlements is adequate and not procured by duress.
2. Settlement in the amount set forth in the Stipulation is hereby approved, and the parties are directed to carry out the requirements settlement.
3. The liability of the Employer and its Carrier for all past and future installments of compensation and medical benefits, attorney's fees and costs under the *Longshore and Harbor Workers' Compensation Act* as a result of the Claimant's incident on July 13, 2001, will be discharged upon Claimant's receipt of \$15,000.00 from the Employer and its Carrier. The file of OWCP No. 6-185798, OALJ Case No. 2002-LHC-00878, *James Henderson v. Florida Stevedoring Company and Signal Mutual Indemnity Association, Ltd.* will be closed.

4. The liability of the Employer/Carrier for all future expenses and medical treatment causally related to Claimant's alleged incidents and injuries, as referred to in paragraph three (3) and more fully described in the 8(i) Settlement, will be discharged on the same conditions as are stated in paragraph five (5) above.
5. Attorney's fees and costs of \$4,500.00 will be paid by the Employer/Carrier to Howard Silverstein, Esq. satisfying in full attorney's fees and costs related to the incident referred to herein.

Now, therefore, under 33 U.S.C. Section 908(i), the settlement is approved, and the terms of settlement are **ACCEPTED** upon the Findings and Conclusions set forth above.

SO ORDERED

A

Daniel F. Solomon
Administrative Law Judge